Supreme Court, US
FILED
OCT 30 2002

No. 02-252

In The
Supreme Court of the United States

DONNA VIZCAINO and LESLEY STUART,
in their individual capacity,

Petitioners,

vs.

JON R. WAITE, et al.,

Respondents.

BENDICH, STOBAUGH & STRONG, P.C., Class Counsel,

Real-Party-In-Interest.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

LAWRENCE W. SCHONBRUN
Counsel of Record
LAW OFFICES OF
LAWRENCE W. SCHONBRUN
86 Eucalyptus Road
Berkeley, CA 94705
Tel: (510) 547-8070
Counsel for Petitioners
Donna Vizcaino and
Lesley Stuart

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

ARGUMENT

I. THIS CASE PRESENTS ISSUES OF FEDERAL FEE JURISPRUDENCE.

Petitioners ask this Court to rule on issues of class action attorneys' fee award jurisprudence which involve federal law and federal judicial policy. Respondents argue that petitioners do not cite or discuss a single Washington State case. However, Petitioners, the Washington State Federal District Court, and the Ninth Circuit Court of Appeals all recognized that Washington State has adopted federal law with regard to the awarding of reasonable attorneys' fees from class action common fund settlements. Indeed, save *Bowles v. Department of Retirement Sys.*, 121 Wn.2d 52, 842 P.2d 440 (1993) – which announces Washington State's intention to follow federal law – every case cited by the federal district court and the Ninth Circuit is a federal case.

Respondents' assertion that "[Petitioners] never argued that federal law could or should override Washington law" is misleading. Everyone involved in this fee litigation understood that Washington State had adopted federal fee jurisprudence as its fee jurisprudence for awarding reasonable attorneys' fees from a class action common fund settlement.

As the Ninth Circuit stated:

> The district court [in applying Washington State law] followed the Ninth Circuit practice of looking to federal law for guidance in this area, and we will do the same.

Pet. App. 5.

The *Bowles* case was decided before the Ninth Circuit decision in *In re Washington Public Power Supply Sys. Sec. Litig. (WPPSS)*, 19 F.3d 1291 (9th Cir. 1994), and therefore did not contemplate and had no opportunity to address the question of whether *WPPSS's* rejection of *City of Burlington v. Dague*, 505 U.S. 557 (1992), in a common fund context, was appropriate. Petitioners believe that the Ninth Circuit decision in *WPPSS* was incorrectly decided as a matter of federal law, in light of this Court's decision in *City of Burlington v. Dague*.

It must be emphasized that the "standards of Washington State law" are federal fee jurisprudence and that Petitioners raised the risk multiplier issue before both courts. The district court stated:

> The applicability of the sixth and tenth factors may be in doubt. *See City of Burlington v. Dague*. . . . (Pet. App. 37 n.2),

and the Ninth Circuit stated:

> The bar against risk multipliers in statutory fee cases does not apply to common fund cases. *WPPSS*. . . . (Pet. App. at 13).

Furthermore, petitioners do not raise an issue of judicial discretion but one of law, asking this Court to determine whether its ruling in *City of Burlington v. Dague, supra,* applies when calculating a reasonable attorneys' fee in a common fund context. This is an issue over which the Circuits disagree.

Petitioners' lodestar cross-check issue is not a "procedural quibble[s]." It directly addresses the district court's use of a risk multiplier to nearly *quadruple* class counsel's

attorneys' fee award – a factor prohibited by this Court's decision in *Dague, supra*.

II. ERISA IS RELEVANT.

Petitioners believe that ERISA is relevant to this Court's consideration of the issues raised in their Petition. As Respondents note:

> Defendant Microsoft removed the case to federal court because it included . . . claims within ERISA.

Resp't Opp'n at 1.

While plaintiffs prevailed on their state claims, the dismissal of their ERISA claims was on appeal at the time of the settlement, and the settlement agreement included the class's state law claims *and* federal ERISA claims. Whether class counsel and the district and appellate courts could disregard the ERISA fee-shifting statute (and thereby obviate this Court's decision in *Dague, supra*), in seeking an award for reasonable attorneys' fees from the common fund, is also an issue which petitioners have asked this Court to decide.

Class counsel noted this issue in their Second Brief on Fees:

> Objector counsel, Mr. Schonbrun, makes a vague argument that ERISA fee-shifting principles might apply here even though the Settlement Fund is based on the class members' winning state law (ESPP) claim. . . . Percentage fees, however, are also reasonable in settlements involving claims under ERISA.

Class Counsel's Second Brief on Fees, filed 3/20/01, at 4 n.4; *see also* Appellants' Excerpts of Record at 33.

Petitioners have asked this Court to rule on whether a lodestar cross-check of a percentage fee award can disregard *Dague, supra's,* risk multiplier prohibition in class actions which settle federal claims brought under a federal fee-shifting statute as well as state law claims. When class counsel seek reasonable attorneys' fees as a percentage of a common fund recovery, and the district court performs a lodestar cross-check, is a risk multiplier a permissible factor to consider as a part of the fee calculation?

CONCLUSION

This Petition raises issues of national importance with regard to federal fee jurisprudence in the awarding of reasonable attorneys' fees in class actions, and Petitioners respectfully request that their Petition for Certiorari be granted.

Respectfully submitted,

LAWRENCE W. SCHONBRUN
LAW OFFICES OF
LAWRENCE W. SCHONBRUN
86 Eucalyptus Road
Berkeley, CA 94705
(510) 547-8070

Attorney for Petitioners